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No. 08-_____

IN THE

Supreme Court of the United States

JOSEPH AFANWI,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 16, 2009

QUESTIONS PRESENTED

1. Whether an alien in a deportation proceeding is denied his Fifth Amendment right to due process when ineffective assistance of retained counsel prevents him from pursuing his statutorily authorized appeal from an order of removal resulting from denial of well-founded claims for asylum, withholding of removal, and relief under the Convention Against Torture.

2. Whether the Board of Immigration Appeals has jurisdiction to reopen proceedings for the purpose of providing a remedy for ineffective assistance of counsel where, following the Board's final decision, counsel neglected to file a petition for review in the Court of Appeals.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Joseph Afanwi and Michael B. Mukasey, Attorney General.

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PETITION FOR A WRIT OF CERTIORARI

Joseph Afanwi petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 3a-22a) is reported at 526 F.3d 788 (4th Cir. 2008). The order of the court denying Petitioner's petition for rehearing and rehearing en banc (Pet. App. 1a-2a) is unreported.

The Board of Immigration Appeals ("BIA") decision affirming the denial of Petitioner's asylum claim (Pet. App. 27a-29a) was issued on November 29, 2005, its order denying Petitioner's motion to reissue its decision (Pet. App. 26a) was issued on February 13, 2006, and its order denying Petitioner's motion to reopen immigration proceedings (Pet. App. 23a-25a) was issued on May 12, 2006. All three are unreported.

The decision of Immigration Judge Jill H. Dufresne denying Petitioner's application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT") (Pet. App. 30a-71a) was issued on July 22, 2004, and is unreported.

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's petition for rehearing and rehearing *en banc* (Pet. App. 1a-2a) was issued on August 19, 2008. On October 27, 2008, the Chief Justice extended the time to file this petition to January 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case primarily involves the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

In addition, the principal statutory provisions involved are 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A), 1231(b)(3)(A), and 1252. The relevant regulations are 8 C.F.R. §§ 1003.1, 1003.2, and 1208.16. These statutes and regulations are set out in the Appendix to this petition. (Pet. App. 72a-81a.)

STATEMENT

The courts of appeals are divided 7-2 over whether an alien has a Fifth Amendment due process right to effective assistance of counsel, if retained, in deportation proceedings. The Attorney General has recently deepened the conflict by overturning twenty years of BIA precedent and siding with the minority view that aliens lack such a right. Nevertheless, the Attorney General has conceded the importance both of national uniformity on this issue and of providing some remedy for ineffective assistance of counsel in deportation proceedings in egregious circumstances. Moreover, the Attorney General's acknowledgement of the critical importance of effective assistance of counsel contravenes his and the court below's erroneous and formalistic conclusion that there is no Fifth Amendment right to effective assistance because retained counsel is not a "state actor." This Court's intervention is necessary to resolve this deep conflict on an issue of paramount importance.

A. Background

The Immigration and Nationality Act authorizes the Attorney General to grant an alien asylum if the alien cannot return to another country because of "persecution or a well-founded fear of persecution on account of ... political opinion." 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). While a grant of asylum is discretionary, withholding of removal is mandatory if "the alien's life or freedom would be threatened in that country because of the alien's ... political opinion." 8 U.S.C. § 1231(b)(3)(A).

An alien may also seek relief under the CAT if the alien can demonstrate that "more likely than not he or she would be tortured" if returned to the country of origin. 8 C.F.R. § 1208.16(c)(2). Like withholding of removal, CAT relief is not discretionary, but rather "*shall* be granted if the applicant's eligibility for withholding is established." *Id.* § 1208.16(d)(1) (emphasis added).

"'It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'" *Demore v. Hyung Joon Kim*, 538 U.S. 510, 523 (2003) (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)). Further, Congress has expressly provided that all aliens facing removal proceedings "shall have the privilege of being represented (at no expense to the Government) by such counsel ... as he shall choose." 8 U.S.C. § 1362. It has also provided that hearings must be scheduled such "that an alien be permitted the opportunity to secure counsel before the first hearing date," *id.* § 1229(b)(1), and that "[t]he Attorney General shall provide for lists ... of persons who have indicated their availability to

represent pro bono aliens [in removal proceedings]," *id.* § 1229(b)(2).

Pursuant to its regulations, BIA has jurisdiction to reopen removal proceedings to remedy ineffective assistance, for example, by issuing a new removal order with a "fresh" deadline for appellate review. *See In re Compean*, 24 I&N Dec. 710, 740-41 (A.G. 2009); 8 C.F.R. § 1003.2(a). Congress also has provided for "[j]udicial review of a final order of removal," including review of constitutional claims. 8 U.S.C. § 1252(a)(1). The petition for judicial review "must be filed not later than 30 days after the date of the final order of removal." *Id.* § 1252(b)(1).

B. Relevant Facts

Cameroon has been ruled by strongman Paul Biya since 1982. (Pet. App. 134a.) His Francophone regime has been criticized for its repression of Anglophone citizens, and for ruthlessly crushing perceived opposition. (*Id.* at 128a-129a.) Members of targeted groups, such as the Southern Cameroon National Council (SCNC), an Anglophone separatist group, are at risk of arrest, detention and torture at the hands of Biya's security forces. (*Id.*) Prison conditions are notoriously harsh; it is not uncommon for detainees to die in custody. (*Id.* at 134a.)

Joseph Afanwi presented evidence in his removal proceedings to show that he has been affiliated with the SCNC since its founding, and that he began participating in anti-government activities in 1990. He gave detailed testimony of many incidents of persecution, including numerous separate occasions on which he personally was either violently beaten or captured and tortured on account of his political activities and affiliations. (Pet. App. at 87a-90a, 93a-

97a.) For instance, in 1990, a Francophone police officer stopped Afanwi on his way home from church and beat him thoroughly with a rifle butt and baton. (*Id.* at 87a-88a.) Likewise, following a 1994 rally, three police officers followed Afanwi home, beat him severely, and warned him to stop organizing rallies. (*Id.* at 93a.) Two particularly brutal incidents occurred in the late 1990s. In 1997, Afanwi was imprisoned for six days during which he suffered several savage beatings; on the last day, Afanwi was beaten unconscious and woke up in the hospital with genital swelling so severe that he lost one of his testicles. (*Id.* at 95a-97a.) In 1999, Afanwi was again captured for several days on account of his political affiliations with the SCNC; he was beaten severely, denied food and water, and deprived of sleep. (*Id.* at 98a-100a.)

Victor T. Le Vine, an expert on political conditions in Cameroon, testified that Afanwi's testimony and detailed descriptions of detention conditions were "eminently credible." (Pet. App. at 127a-128a.) Two other experts with intimate knowledge of Cameroonian conditions agreed that Afanwi's testimony comported with their knowledge, and opined that they expected that he would very likely be tortured if returned. (*See id.* at 55a, 64a-65a.) Further, three expert witnesses, including a psychologist with expertise in diagnosing torture victims, gave unrebutted evidence consistent with Afanwi's descriptions of his torture and beatings. (*Id.* at 46a-53a, 63a-64a.)

Afanwi also provided documentary evidence corroborating the specific claims and incidents described in his testimony. This included, *inter alia*,

a statement from Beatrice Fon, Afanwi's mother, confirming that on "several occasions" Afanwi had "suffered serious injuries while in the custody of Cameroonian security forces" and describing "two particularly horrendous beatings" Afanwi had suffered at the hands of Cameroonian security forces. (*Id.* at 82a-84a.)

Following this 1999 arrest and detention, Afanwi went into hiding in a Presbyterian Mission. (Pet. App. at 100a-101a.) The Cameroonian police were looking for SCNC leaders, and in March 2002 left a summons for Afanwi at his mother's home. (*Id.* at 102a.) The Presbyterian church hiding Afanwi selected him to attend a conference in the United States, giving him the opportunity to escape Cameroon. (*Id.*) He arrived in Washington, DC on July 22, 2002 as a B-2 visitor with permission to remain in the United States until January 2003. (*Id.* at 102a-103a.) Even after his escape to the United States, Cameroonian officials continued to seek him for arrest. (*Id.* at 12a, 24a.) He filed his initial application for asylum, withholding of removal, and CAT relief *pro se* in December 2002, and filed a revised application in January 2003 after receiving pro bono legal representation. (*See id.* at 54a, 60a.)

C. The Proceedings Below

Mr. Afanwi's petition was heard by an asylum officer on January 23, 2003, who referred the case to Immigration Court in Baltimore, which had jurisdiction to adjudicate the application. *See* 8 C.F.R. §§ 1208.2, 1208.14; (Pet. App. 60a). A hearing was held, and on July 22, 2004, IJ Dufresne denied Afanwi all relief in light of her adverse credibility determination. (*Id.* at 61a-69a.) The IJ deemed the

affidavit of Afanwi's mother, Ms. Fon, describing in detail "two particularly horrendous beatings" that she had "personally treated," inconsistent with Afanwi's claim to have been beaten on several occasions. (*Id.* at 62a-63a.) The IJ also found it implausible that Afanwi's mother would sustain a beating rather than tell the police of her son's whereabouts, when he was "already safe in the United States." (*Id.* at 66a-67a.)

The IJ considered implausible Afanwi's claim to have left his hiding place in 1990 to attend church. (Pet. App. 63a.) She also considered implausible Afanwi's claim to have been both beaten and put to forced labor while in custody. (*Id.* at 66a.) Finally, she found it "highly implausible that Respondent would be able to run away after being repeatedly mistreated over the course of more than ten days. This simply makes no sense." (*Id.*) The IJ did not articulate any further basis for finding these claims implausible.

The IJ rejected a newspaper article Afanwi produced describing the arrest of the phonetically-identical "Joseph Afonui" because this is not how Afanwi spells his name. (Pet. App. 67a.)

Discussing Afanwi's witnesses generally, the IJ acknowledged that "the record is replete with affidavits submitted on Respondent's behalf," but concluded that "none sufficiently corroborates his claims of arrest and mistreatment." (Pet. App. 64a-65a.) She criticized the expert testimony supporting Afanwi's general claims about country conditions on the ground that none of them had firsthand knowledge of his experience (*id.*), and the testimony of those who had firsthand knowledge on the ground

that in various cases they neglected to mention every detail that Afanwi mentioned. (*Id.* at 65a.)

The IJ declined to accept Dr. Basch's conclusion that Afanwi "did suffer the torture and abuse that he claims." (Pet. App. 63a-64a.) Her reasoning was that Dr. Basch's first affidavit described "[t]he presence of one testis in the scrotum with evidence of surgery on the scrotum and groin" while his second noted "[t]he presence of one testis in the scrotum with evidence of trauma to the scrotum and groin." (*Id.*) She rejected the testimony of Dr. Shu that Afanwi had been "involved in repeated cases of assault" because Dr. Shu "does not speculate on how Respondent received his injuries." (*Id.* at 64a.)

The IJ's introductory summary of evidence devotes considerable attention to Dr. Cogar's testimony as an expert psychologist specializing in torture, and notes that this testimony corroborated Afanwi's testimony to a large extent, and that Dr. Cogar found Afanwi's testimony credible and his minor inconsistencies themselves consistent with his symptoms of post-traumatic stress disorder. (Pet. App. 46a-53a.) However, the IJ did not discuss the merits of this testimony in her evaluation of Afanwi's claims. (*See generally id.* at 61a-69a.)

The IJ therefore denied Afanwi's eligibility for asylum and withholding of removal, and denied Afanwi's CAT claim without any independent analysis, but rather "for the reasons cited above in the denial of asylum." (Pet. App. 68a-70a.)

Afanwi filed a timely appeal and brief with BIA through his prior pro bono counsel. (Pet. App. 5a.) On November 29, 2005, BIA issued its decision adopting the IJ's adverse credibility finding and

dismissing the appeal despite "agree[ing] with the respondent that the Immigration Judge engaged in some unwarranted speculation." (*Id.* at 27a-29a.)

BIA mailed its order to prior counsel at the street address of his multi-firm office building in Washington, DC, but without specifying the name of counsel's law firm. (Pet. App. 5a, 10a & n.14.) Prior counsel had moved to California in the meantime, and had left instructions to forward his mail. (*Id.* at 5a.) This mail was not forwarded, however, and prior counsel first received BIA's order eight days after the deadline to file a petition for review under 8 U.S.C. § 1252(b)(1). (*Id.*) Therefore, although Afanwi had relied upon his prior counsel's agreement to file a petition for judicial review if necessary, Afanwi was unable timely to appeal BIA's decision. (*Id.*) With Afanwi's consent, prior counsel filed a motion to rescind and reissue BIA's decision, relying on the incomplete address used by BIA, because it appeared to be the best way to facilitate a timely appeal for judicial review. (*Id.*) After BIA denied that motion on February 13, 2006 (on the ground that the mailing error was not attributable to BIA), prior counsel was replaced by Petitioner's current counsel. (*Id.* at 5a, 26a.)

On February 27, 2006, Afanwi timely filed a motion to reopen proceedings with BIA, introducing new evidence that in December 2005, police confronted and interrogated Afanwi's family members regarding his whereabouts. (Pet. App. 141a-144a.) The motion also asserted that ineffective assistance of counsel had prevented him from timely filing a petition for judicial review. (*Id.* at 5a-6a.) BIA denied the motion to reopen, claiming that it

lacked jurisdiction to reopen because the claimed error related to the filing of a petition for review, which occurred after the Board's final decision. (*Id.* at 5a, 23a-25a.)

Also on February 27, 2006, ninety days after BIA's initial decision, Petitioner filed in the Fourth Circuit a petition for review of the IJ and BIA decisions. (Pet. App. 6a.) On March 8, 2006, Afanwi filed a second petition, captioned as a "corrected" petition for review, to seek review of BIA's denial of the motion to reissue. (*Id.*) On June 8, 2006, Afanwi filed a third petition, captioned as an "amended petition for review," to include BIA's denial of the motion to reopen. (*Id.*)

After supplemental briefing on the effective assistance of counsel issue, the Fourth Circuit denied Afanwi's petition for review. It denied review of Afanwi's merits claim, because the petition was not filed within thirty days after BIA's decision, as required by 8 U.S.C § 1252(b)(1). (Pet. App. 9a-10a.) It also found that even if BIA had used a correct address when mailing its decision, prior counsel still would have missed the deadline for filing the petition for review. (*Id.* at 10a.) The court next held that BIA lacked jurisdiction to reopen the proceedings to remedy an error which occurred at the petition-for-review stage, thus foreclosing any administrative remedy for the ineffective assistance. (*Id.* at 13a-15a.) The court then acknowledged Afanwi's Fifth Amendment right to due process in his removal proceedings, and noted also that a number of courts of appeals have found a Fifth Amendment violation where counsel's deficient performance affects the fundamental fairness of the proceeding. (*Id.* at 15a-

18a.) The court declined to join those circuits, however, holding instead that "retained counsel's ineffectiveness in a removal proceeding cannot deprive an alien of his Fifth Amendment right to a fundamentally fair hearing." (*Id.* at 18a.) The court explained that "Afanwi's counsel was not a state actor, nor is there a sufficient nexus between the federal government and counsel's ineffectiveness such that the latter may fairly be treated as governmental action." (*Id.* at 20a.)

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SHARPLY DIVIDED OVER WHETHER INEFFECTIVE ASSISTANCE OF COUNSEL TO A PERSON IN A REMOVAL PROCEEDING MAY, UPON A SHOWING OF SUFFICIENT PREJUDICE, CONSTITUTE A VIOLATION OF DUE PROCESS FOR WHICH A REMEDY IS CONSTITUTIONALLY REQUIRED

It is well-established that persons being subjected to possible deportation are entitled to the protections of the Due Process Clause. *See Demore*, 538 U.S. at 523. The precise parameters of the process that is thus constitutionally required is somewhat less clear and one area of sharp disagreement among the circuits concerns the availability of a remedy for ineffective assistance of counsel that results in denial of a fundamentally fair proceeding.

Seven courts of appeals – the First, Second, Third, Sixth, Ninth, Tenth and Eleventh Circuits – have expressly recognized that constitutional due process may be violated where the performance of retained counsel is ineffective in the context of a removal proceeding and prejudice is shown to result. This

conclusion is based on the rationale that while the Sixth Amendment's right to appointed counsel does not apply in a civil proceeding, the Fifth Amendment Due Process Clause is plainly applicable and may be violated when a retained lawyer's ineffective performance deprives the removal process of fundamental fairness. *See Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) ("[i]neffective assistance of counsel in a deportation proceeding is a denial of due process" where the proceeding was "fundamentally unfair") (citation and internal quotation marks omitted); *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003) (same); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007) (same); *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001) (same); *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006) (same); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002) (same); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2005) (same).

Several of these circuits have also acknowledged a due process right to a remedy for ineffective assistance where counsel's ineffectiveness occurs during the petition-for-review phase of a removal proceeding. *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000) ("where an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely" and prejudice is presumed because "the adversary process itself has been rendered presumptively unreliable") (citation and internal quotation marks omitted); *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) ("the fact that counsel failed to petition for judicial review of the findings of the BIA ... result[s] in a denial of due process... [if the alien] would have been entitled

to continue residing in the United States"); *Perez*, 330 F.3d at 101 ("[d]eprivation of the opportunity for judicial review can be established by demonstrating ineffective assistance of counsel"); *Chmakov v. Blackman*, 266 F.3d 210, 216 (3d Cir. 2001) (recognizing that "habeas might be available...if a due process violation frustrated...deportee's right of direct appeal" where counsel filed neither brief with BIA nor appeal to Third Circuit, thereby rendering the proceedings fundamentally unfair) (citation and internal quotation marks omitted).

By contrast, two courts of appeals, first the Fourth Circuit in the present case, and more recently the Eighth Circuit, have categorically ruled that the Due Process Clause, while applicable in the context of a removal proceeding, does not provide any remedy where counsel's ineffectiveness renders the proceeding fundamentally unfair. (Pet. App. 18a); *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008) (holding "there is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding").[1] And last week, the outgoing Attorney General, relying largely on these cases, concluded that "there is no constitutional right to effective assistance of counsel in [removal] proceedings," *In re Compean*, 24 I&N Dec. 710, 726

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[1] The Seventh Circuit has issued conflicting decisions on the matter. *See, e.g., Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) (recognizing due process right); *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005) (denying due process right); *Sanchez v. Keisler*, 505 F.3d 641, 647 (7th Cir. 2007) (finding that effective assistance right in removal proceedings is "derived ... ultimately [from] the Fifth Amendment's due process clause").

(A.G. 2009), and directed BIA and IJs to apply his decision "even in circuits that have previously held that there is a constitutional right to effective assistance of counsel." *Id.* at 730 n.8.

The ruling of the court below went further, however, also holding that "the BIA does not have jurisdiction over an ineffective assistance claim arising out of an alien's counsel's failure to file a timely petition for review with the court of appeals." (Pet. App. 14a-15a.) This has the effect of cutting off persons in the Fourth Circuit from even the limited administrative right to effective assistance that BIA has provided in some form since 1988. *See Compean*, 24 I&N Dec. at 731. Thus, the decision below conflicts with the other courts of appeals to consider the issue, and with the Attorney General's own interpretation of BIA's jurisdiction. *See Jin Bo Zhao v. INS*, 452 F.3d 154, 157-60 & n.5 (2d Cir. 2006) (recognizing BIA authority to reopen and reissue decision to remedy attorney's failure to file petition for review); *Sako*, 434 F.3d at 863 (stating that where attorney failed to petition for review, "successful motion to reopen due to ineffective assistance of counsel" was possible if party complied with administrative requirements and showed prejudice); *Dearinger*, 232 F.3d at 1044 n.4 ("A claim of ineffective assistance of counsel occurring after the BIA has ruled may be raised with the BIA by filing a motion to reopen."); *Compean*, 24 I&N Dec. at 740 ("the Board has jurisdiction to consider deficient performance claims even where they are predicated on lawyer conduct that occurred after a final order of removal has been entered").

II. THE ISSUES PRESENTED ARE OF GREAT AND RECURRING IMPORTANCE

In FY 2007, the immigration courts heard over 270,000 removal cases, of which over 15,000 included a defensive assertion of asylum eligibility. U.S. Dep't of Justice, Executive Office for Immigration Review, FY 2007 Statistical Year Book C3, I1 (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf. At the same time, BIA heard over 30,000 appeals from IJ case decisions. *Id.* at T2. Approximately 42% of cases before the immigration courts and 75% of BIA appeals were argued by attorneys. *Id.* at A1-A2. The sheer volume of such litigation makes it a matter of the utmost importance that this Court define the due process rights of persons subject to removal with clarity so they are not subject to varying interpretations from one circuit to another—a point which the Respondent has conceded. *Compean*, 24 I&N Dec. at 730 n.8 (stressing "interest of national uniformity" with respect to such rights).

The rights at issue in deportation proceedings are also of the utmost importance. This Court has compared deportation to "banishment" and "exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *INS v. Errico*, 385 U.S. 214, 225 (1966). In upholding a alien's due process rights in deportation proceedings, this Court commented on the profound consequences of deportation, observing:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That

> deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, 326 U.S. 135, 154 (1945). These observations are particularly apt where, as here, the defenses to deportation include claims for asylum, withholding of removal, and protection under the CAT. Deportation in such cases can be equivalent to a sentence of imprisonment, torture, or death. The seriousness of deportation adds to the importance of clearly defining and uniformly applying the due process rights of people facing this grave consequence. Indeed, the Attorney General conceded that "the stakes in removal proceedings are sometimes high, the immigration laws can be complex, and many aliens would be better equipped to navigate them with counsel" and that "regrettably, the deficiencies of the immigration bar are well known." *Compean*, 24 I&N Dec. at 728 (alteration, citation, and internal quotation marks omitted).

Adding to the importance of the issue is that as grave as the consequences of an adverse immigration judgment can be, the current adjudicatory system struggles to ensure even basic fairness. Judge Richard Posner of the Seventh Circuit recently described the process of immigration adjudication as "clearly inadequate," and complained that BIA "does not have the resources to give more than a perfunctory review" of IJ decisions. Lynne Marek, *Posner Blasts Immigration Courts as 'Inadequate' and Ill-Trained*, Nat'l L.J. (web ed.), Apr. 22, 2008,

http://www.law.com/jsp/article.jsp?id=1208861007986 (last visited Jan. 16, 2009). Statistical studies reveal systematic arbitrariness in the decisions of immigration judges, exploding numbers of appeals to the federal circuit courts, and serious disparities in results for similarly situated persons. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007).

In light of these problems, this Court should resolve the issue whether a due process remedy exists for ineffective assistance of counsel in removal proceedings, and the extent of BIA's authority to alternatively provide for such a right vis-à-vis petitions for review, in order to ensure uniformity in the application of this right and bring a modest amount of order to this critical process.

III. PETITIONER'S RIGHT TO DUE PROCESS WAS DENIED BY THE DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL

A. Due Process Requires A Remedy For Ineffective Assistance Of Counsel Resulting In Prejudice To Persons Seeking Asylum, Withholding Of Removal, And CAT Relief

"'It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.'" *Demore*, 538 U.S. at 523 (quoting *Reno*, 507 U.S. at 306). This is hardly surprising given what is at stake: though technically not criminal, it is the equivalent of "banishment" or "exile," *Fong Haw Tan*, 333 U.S. at 10, and that "deportation is a penalty—at times a most serious one—cannot be doubted." *Bridges*, 326 U.S. at 154. Where a person seeks to avoid deportation by asylum, withholding of removal, or CAT relief, the fairness

and reliability of the procedures may actually determine whether he will ultimately be tortured or killed should he be deported. Thus, due process in the removal context requires "all opportunity to be heard upon the questions involving his right to be and remain in the United States." *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

1. This Court's Ineffective Assistance Doctrine Is Rooted In The Due Process Clause

The Due Process Clause's guarantee of effective assistance of counsel is deeply rooted in American law and operates independent of the Sixth Amendment's guarantee of counsel. *See Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000) (Sixth Amendment inapplicable on appeals); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (due process requires effective assistance on direct criminal appeal); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("[t]he Constitution guarantees a fair trial through the Due Process Clauses"). Where the constitution requires such a right, there is "no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980).

This is so because in cases where the state seeks to deprive a party of liberty, the effective assistance of an attorney "whether retained or appointed ... plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685. And when counsel is prejudicially ineffective, the entire conduct of the state's adverse proceeding is tainted, such that "*it is the State* that unconstitutionally deprives the defendant of his liberty," even as to "defendants who

must choose their own lawyers." *Cuyler*, 446 U.S. at 343, 345 (emphasis added).

Moreover, such a due process right extends to appellate review. In *Evitts*, the Court held that while the state need not create a process of appellate review, once it does so the statutory right to appeal functions "as an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," and "the procedures used in deciding appeals must comport with the demands of the Due Process ... Clause[] of the Constitution." 469 U.S. at 393 (citation and internal quotation marks omitted). As such, counsel's failure to file a required "statement of appeal," denied the defendant any opportunity for appellate review, and thus worked a denial of due process. *Id.* at 389, 396.

While those cases arose out of the deprivation of liberty attendant to a criminal trial and direct appeal, it has long been settled that the Due Process Clause also guarantees the "essential fairness of the state-ordered proceedings anterior to adverse state action" in nominally "civil" cases which are nonetheless "barely distinguishable from criminal condemnation in view of the magnitude and permanence of the loss [the affected party] faces." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119-20 (1996). It is also settled that in certain serious, non-criminal proceedings, the Fifth Amendment's Due Process Clause requires that individuals be entitled to effective assistance, and thus the availability of a remedy when it is denied. *See, e.g., In re Gault*, 387 U.S. 1, 30-31 (1967) (holding that an adjudication of delinquency in non-criminal juvenile "'without effective assistance of counsel'" is inconsistent with

due process) (quoting and "reiterat[ing]" holding of *Kent v. United States*, 383 U.S. 541, 554 (1966)); *Vitek v. Jones*, 445 U.S. 480, 497 (1980) (noting that five Justices agreed that party entitled to "competent" assistance of trained professional at involuntary commitment hearing).

This Court has recognized that the practical consequences of an erroneous deportation can be comparable to the consequences of a criminal conviction. It follows that if an alien retains counsel, and that counsel prejudicially taints the removal proceedings with ineffective assistance, the *Government* violates due process by relying on those proceedings in order to deprive an alien of his liberty. *Cf. Cuyler*, 446 U.S. at 343; *Strickland*, 466 U.S. at 685; *M.L.B.*, 519 U.S. at 120. And on that point, there is no justification that could explain how the Due Process Clause could *forbid* the Government from depriving a person's liberty in prejudicially tainted, state-ordered criminal proceedings, but that the same clause would *allow* the Government to deprive a person's liberty, and send him to likely persecution or torture, in similarly tainted state-ordered removal proceedings.

Moreover, the right to effective assistance plainly extends to the petition-for-review stage, as judicial review is "an integral part of the ... system for finally adjudicating" the question of deportability. *See Evitts*, 469 U.S. at 393 (citation and internal quotation marks omitted). Judicial review of final orders of removal provided by 8 U.S.C. § 1252(b)(2) ensures that "petitioner's due process rights are not violated," *see Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003), and assures the alien that "[i]f the

BIA's practices result in a decision that allows a non-harmless error to slip through, there is always the avenue of an appeal to the courts to correct the error." *See Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 281 (4th Cir. 2004). Judicial review of removal decisions thus serves the same error-correcting function that this Court found critical in extending the right to effective assistance of counsel to the appellate stage in *Evitts*.

2. This Court's Precedents Prescribe A Due Process Based Remedy For Ineffective Assistance Of Immigration Counsel

This Court's governing test for due process remedies set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)—which examines the private interest implicated by a government action, the risk of an erroneous deprivation of that interest absent the procedural safeguards in question, and the Government's interest or burden in avoiding such safeguards—confirms that an alien should have a remedy for prejudicial ineffective assistance of counsel in deportation proceedings involving asylum, withholding of removal, and CAT claims. The importance of retained counsel to the deportation process coupled with the risks of an erroneous deprivation caused by prejudicial ineffective assistance, shows that due process forbids the Government from deporting a party through a removal proceeding tainted by such ineffectiveness.

Private interest. *First*, the alien's "private interest that will be affected by the official action" here, the deportation, are of the highest order. *See Eldridge*, 424 U.S. at 335. It is the equivalent of banishment or exile, *Fong Haw Tan*, 333 U.S. at 10,

often for a person who has resided in the United States for an extended period and has family and friends there. Where the alien defends on the grounds of a well-founded fear of persecution, torture or death, a great deal more than that may be at stake.

Risk of deprivation. *Second,* the "risk of an erroneous deprivation of such interest" without any safeguards against ineffective assistance is high, as is the "probable value" of the additional safeguard of an effective assistance right, both at the hearing and appellate level. *Eldridge*, 424 U.S. at 335. Immigration law is "a notoriously complex and constantly shifting area of law." *Zhang v. United States*, 506 F.3d 162, 169 (2d Cir. 2007); *see also, e.g., INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 195 (1991) (recognizing the "complex regime of immigration law"). As one court recently put it, "it is difficult to imagine a layman more lacking in skill or more in need of the guiding hand of counsel, than an alien who often possesses the most minimal of educations and must frequently be heard not in the alien's own voice and native tongue, but rather through an interpreter." *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 807 (9th Cir. 2007). And, indeed, a widely-reported statistical analysis of recent asylum decisions shows that unrepresented asylum seekers before an immigration court were successful only 16.3% of the time, while represented aliens as a whole had a 45.6% success rate, with higher success rates for what the authors considered "quality" representation (such as that provided by Georgetown Law School's asylum clinic and large law firm pro bono programs). Ramji-Nogales et al., *supra*, at 340-41.

Moreover, Congress has ratified the critical role of counsel in deportation proceedings by codifying the due process right of aliens to retain counsel and be represented throughout the deportation proceedings. *See* 8 U.S.C. § 1362. Congress likewise requires that the Government affirmatively provide aliens facing deportation with notice of their right to counsel, a "current list" of pro bono attorneys, and time to obtain counsel. 8 U.S.C. § 1229(a)(1)(E)(ii), (b)(1)-(2). There can be little doubt that effective assistance of retained counsel is of the utmost importance to the aliens facing such proceedings, and that prejudicially ineffective counsel creates a high risk of an erroneous deportation.

Effective assistance of counsel at the federal appellate review stage likewise provides a significant safeguard against erroneous deprivations of liberty. The problems of the immigration courts, have been well-documented. *See, e.g.*, *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.) (finding that the "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice"); *N'Diom v. Gonzales*. 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (noting in the immigration context the "significantly increasing rate at which adjudication lacking reason, logic, and effort" appears in the federal courts); Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. Times, Dec. 26, 2005, at A1; Ramji-Nogales et al., *supra*, at 373 (noting "dramatic" inconsistency among adjudication of asylum cases at the IJ level).

Additionally, BIA's procedural "streamlining" of 2002—including the elimination of three-judge

review panels in most instances in favor of single-member summary affirmance without opinion—has led to a marked decrease in the rate at which BIA has found errors in IJ reasoning. Ramji-Nogales et al., *supra*, at 355, 377. This has led to a widespread perception that BIA's review procedures have become less fair and effective, and resulted in a significant increase in federal court review. *See, e.g., id.*; *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004) stating that "the natural ... consequence of the streamlining regulations is summary affirmance by the BIA of stale, backlogged decisions by IJs. When it does so, the BIA may have shirked its role and duty of ensuring that the final agency determination in an immigration case is reasonably sound"); Pamela A. MacLean, *Immigration Bench Plagued By Flaws*, Nat'l L. J., Feb. 6, 2006, at 1 ("[w]hen the BIA had a more active role, it would clean up decisions .... Now [it] is a rubber stamp" (quoting former BIA Judge Lory Rosenberg)); *id.* ("[t]he BIA was effectively neutered by streamlining" (quoting Ninth Circuit Judge Michael Daly Hawkins)).

Noting such concerns, appellate courts have held that any such unfairness caused by BIA's truncated review procedures is mitigated by the federal courts' own role in review and error-correction of IJ and BIA decisions. *See, e.g., Zhang v. U.S. Dep't of Justice*, 362 F.3d 155, 158 (2d Cir. 2004) ("Our conclusion that streamlining does not violate due process is ... supported by the fact that the challenged procedures are followed by further appellate process, namely, judicial review"); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003) (same); *Georgis*, 328 F.3d at 967 (same); *Blanco de Belbruno*, 362 F.3d at 281 (same). Given that federal courts often provide

the only fora where an asylum or CAT claimant can be assured of thorough and fair appellate-level review, the effective assistance of retained immigration counsel at that level is critical.

Weak Government interest. *Third*, under these circumstances, the "fiscal and administrative burdens" of affording a remedy for prejudicial ineffective assistance of counsel should be given little if any weight, because it is counterbalanced by the Government's weighty interest in the sound implementation of its laws. *See Eldridge*, 424 U.S. at 335. The sovereign decisions to create fair procedures for asylum and withholding of removal, and the national decision to become a signatory to the CAT reflect judgments that, where the tests set forth are met, an alien should not be subjected to persecution or torture. Where the ineffective assistance of counsel results in substantial prejudice, including the likelihood of an incorrect decision, the importance of correcting that error outweighs any marginal interest in cost savings that might accrue from deportations "earned" not on the merits, but from attorney error.

Indeed, the Attorney General has conceded that "[t]here is a strong public interest in ensuring that th[e] deficiencies [of ineffective assistance of counsel] do not affirmatively undermine the fairness and accuracy of removal proceedings." *Compean*, 24 I&N Dec. at 728.

Accordingly, under this Court's governing criteria, due process requires a remedy for ineffective assistance in the context of a deportation proceeding.

3. The Rationale For Rejecting A Due Process Right Advanced By The Fourth Circuit And Repeated By The Attorney General Is Fatally Flawed

The rationale for rejecting a due process right to effective assistance of counsel, advanced by the Fourth Circuit, and expanded upon by Respondent's *Compean* decision, rests on several fundamentally flawed premises.

First, both the Fourth Circuit and Respondent primarily rely on the theory that because retained counsel are not state actors, their errors are not attributable to the state and as such, cannot violate the Constitution. (Pet. App. 19a-21a); *Compean*, 24 I&N Dec. at 719-21. But as described *supra*, the right to effective assistance derives from the due process guarantee of fair proceedings. The state is not allowed to "win" a deprivation of liberty based on the prejudicial errors of counsel, and its reliance on such tainted proceedings is the "state action" that violates due process. *See supra* at Part III.A.1. Indeed, this Court has expressly held that even appointed counsel such as public defenders are not "state actors," *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981), yet the ineffectiveness of these non-state actors nonetheless works a constitutional violation.

Second, Respondent also rests his conclusion on *Wainwright v. Torna*, 455 U.S. 586 (1982) and *Coleman v. Thompson*, 501 U.S. 722 (1991), which found that attorney error could not be attributed to the state in discretionary appeals and collateral habeas review, respectively. *See Compean*, 24 I&N Dec. at 723. But neither case involves the

proceedings by which the state may *deprive* a person of his or her liberty in the first instance, and which therefore must be fair before such a deprivation is allowed. *Coleman* itself made this distinction, noting that the state is constitutionally responsible for "*obtaining* a criminal conviction through a procedure that fails to meet the standard of due process of law." 501 U.S. at 754 (emphasis added; internal citation and quotation marks omitted). An administrative hearing, followed by a right to judicial review under 8 U.S.C. § 1252, is the established process by which an alien's liberty interests may be deprived, and thus the rule of *Wainwright* and *Coleman* is inapplicable.

Third, despite admitting that "the stakes in removal proceedings are sometimes high, the immigration laws can be complex, and many aliens would be better equipped to navigate them with counsel," and conceding that the immigration bar's "deficiencies ... are well known," Respondent rejects a due-process right to effective assistance because the "implications" of his concessions "would arguably require ... Government-appointed counsel [] in removal proceedings." *Compean*, 24 I&N Dec. at 725, 728 (citation and internal quotation mark omitted). But the question of a right to appointed counsel is not presented here, nor does it necessarily follow that a general right to appointed counsel exists in removal proceedings, or would be required to find a due process remedy for ineffective assistance here.

Rather, the question here is whether, given the statutory and regulatory policy of encouraging and facilitating aliens in retaining counsel, the Constitution allows the Government to deport an alien to face likely persecution and torture when, but

for the failure of the attorney to file a petition for review, the final order of removal would have been vacated and reversed.

As shown below, Afanwi had a strong, substantial case that he was persecuted and tortured, and faces likely persecution or torture should be deported. Had he not been deprived of an opportunity for judicial review due to ineffective assistance of counsel, the IJ and BIA's fundamentally flawed denial of relief and final order of removal would have been vacated. Due process should forbid the Government from removing him as a result, not of the strength of his case, but because the attorney he retained provided ineffective assistance.

4. The Fourth Circuit's Additional Holding That BIA Lacks Jurisdiction To Provide Even A Limited Administrative Remedy Is Baseless

The Fourth Circuit' s erroneous rejection of a due process right to effective assistance in removal proceedings was compounded by its perfunctory, and wholly unsupportable, conclusion that BIA also lacked the jurisdiction to provide any remedy for ineffective assistance associated with the filing of a petition for review. (Pet. App. 13a-15a.)

The Fourth Circuit's analysis rested solely on its reading of 8 C.F.R. § 1003.1(d)(3)(ii), which as the Attorney General correctly observes, "addresses only the scope and standard of review by the Board" and "does not purport to restrict the Board's jurisdiction or to limit the Board's broad authority to reopen removal proceedings." *Compean*, 24 I&N Dec. at 740-41. Instead, the regulation addressing BIA's *jurisdiction* plainly permits reopening after a final

order is entered. 8 C.F.R. § 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."). As such, Respondent correctly noted that the Fourth Circuit erred in holding that BIA lacked jurisdiction to provide a remedy for an attorney's failure to file a petition for review. *Compean*, 24 I&N Dec. at 740-41.

B. Under Any Conceivable Standard of Prejudice, Petitioner Was Prejudiced By Counsel's Failure To File A Timely Appeal

To be worthy of a remedy, a lawyer's ineffective assistance must fall below an objective standard of reasonableness and result in prejudice, namely a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. There is some disagreement among the courts that have recognized an ineffective assistance remedy in the immigration context, about the character of the prejudice that must be shown. *See, e.g., Zheng v. Gonzales*, 422 F.3d 98, 106 (3d Cir. 2005) (must show "the alien was prevented from reasonably presenting his case") (citation and internal quotation marks omitted); *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (must show "performance of counsel was so inadequate that it may have affected the outcome of the proceedings").

Whatever the standard, the prejudice requirement is satisfied on the present facts because Afanwi's appeal would have been successful for at least two independent reasons: (1) because the IJ erroneously failed to conduct a separate analysis of Afanwi's CAT claim; and (2) because the IJ's rationale for rejecting

Afanwi's well-documented and corroborated claims of past persecution and his fear of future persecution were based upon so-called "inconsistencies" that are not supported by the record and which no reasonable adjudicator could have relied. The denial of judicial review prevented correction of these errors.

1. The IJ Prejudicially Erred By Failing To Conduct An Independent Analysis Of Afanwi's CAT Claim

Afanwi was first prejudiced by his counsel's ineffectiveness because, had that appeal been filed, the Fourth Circuit would almost certainly have vacated and remanded the administrative decision. This is because, contrary to binding law, the IJ failed to undertake an independent analysis of Afanwi's CAT claim. Such claims are distinct from claims for asylum and withholding of removal, and cannot be resolved simply through a reliance on an adverse credibility finding with respect to the asylum claim. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228, 239 (4th Cir. 2004); *Camara v. Ashcroft*, 378 F.3d 361, 371 (4th Cir. 2004) ("standard[s] for relief" are "different"); *see also, e.g., Taha v. Ashcroft*, 389 F.3d 800, 802 (9th Cir. 2004) ("an adverse credibility finding in the asylum context does not end the Convention inquiry"); *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000) ("[w]e are not comfortable with allowing a negative credibility determination in the asylum context to wash over the torture claim").

In determining eligibility for CAT relief, the adjudicator must consider "all evidence relevant to the possibility of future torture," including "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal" and

"[e]vidence of past torture inflicted upon the applicant. 8 C.F.R. § 208.16(c)(3). "[C]ountry conditions alone can play a decisive role in granting relief under the Convention." *Kamalthas v. INS*, 251 F.3d 1279, 1280 (9th Cir. 2001). Even if not conclusive, "proper attention to relevant country conditions might lend credence to [an applicant's] assertions of torture and cause the BIA to view them in a different light." *Taha*, 389 F.3d at 802 (citation and internal quotation marks omitted).

Pursuant to these standards, the Fourth Circuit has vacated and remanded at least two other decisions by IJ Dufresne, in which she likewise made an adverse credibility judgment yet failed to fully and independently evaluate the petitioners' CAT claims.

In *Camara v. Ashcroft*, 378 F.3d 361, 366 (4th Cir. 2004), a Guinean national was denied asylum, withholding of removal, and CAT relief. Although the Fourth Circuit declined to reverse the IJ's adverse credibility determination, it vacated and remanded on the ground that she did not apply the separate and distinct legal analysis required for a claim under CAT. *Id.* at 371-72. Rather, the IJ simply denied, in perfunctory fashion, the CAT claims "[f]or the aforementioned reasons" related to the denial of asylum and withholding of removal. *Id.* at 371. And given the strength of the testimony left unconsidered, the Fourth Circuit explained that "the IJ's adverse credibility determination was insufficient to support the legal conclusion that Camara was ineligible for relief under the CAT." *Id.* at 372.

Five months later, the Fourth Circuit again vacated and remanded following its consideration of a

petition seeking review of the IJ's denial of relief under the INA and the CAT. *See Curumi v. Ashcroft*, 119 F. App'x 468, 475 (4th Cir. 2005). As in *Camara*, the Fourth Circuit declined to reverse the IJ's adverse credibility determination, but vacated and remanded based on the IJ's failure to apply the separate and distinct legal analysis required for a claim under CAT to the substantial independent evidence that the IJ failed to consider. *Id.* at 473-75.

Just as in *Camara* and *Curumi*, the IJ here failed to make the required separate determination for withholding of removal under CAT but rather made only a perfunctory statement that Afanwi failed to meet his burden of proof "for the reasons cited above in the denial of asylum." (Pet. App. 70a.) This cannot be squared with *Camara*, which emphasized that "an adverse credibility determination cannot alone preclude protection under the CAT." 378 F.3d at 372.

Compounding that error, and contrary to *Camara* and *Curumi*, the IJ and BIA alike dismissed substantial objective evidence of Afanwi's past persecution, ignored State Department reports describing ongoing oppressive conditions and flagrant violations of human rights within Cameroon, and the likelihood that Afanwi faces *future* torture if he is returned to Cameroon. *See Camara*, 378 F.3d at 372; *In re G-A-*, 23 I&N Dec. 366, 368 (BIA 2002).

Accordingly, but for the ineffective assistance, the Fourth Circuit would have vacated BIA's decision and remanded for further review. The error was thus prejudicial.

2. The IJ's Adverse Credibility Finding Was Based On Non-Existent "Inconsistencies" In The Record

In addition to the IJ's failure to properly analyze Petitioner's CAT claim, Petitioner was prevented from raising meritorious arguments that the IJ's adverse credibility judgment was based on supposed "inconsistencies" in the record that were nothing of the sort, or else resorted to naked speculation.

For instance, the IJ discredited the statement of Petitioner's mother because she described a "first major beating" that occurred in April 1997, while Afanwi had described multiple beatings prior to April 1997. (Pet. App. 62a-63a.) But her statement actually *confirmed* that Afanwi had been beaten on "several occasions." (*Id.* at 82a.) The statement then recounted in detail "two particularly horrendous beatings" that she "remembered ... well" because she had treated her son's wounds afterward. (*Id.*) The "first major beating" she referred to in the statement was unambiguously the first of the two she "remembered ... well" and *not* the first that Afanwi had *ever* suffered. (*Id.*) There was no inconsistency.

Likewise, the IJ found that Petitioner was not credible because of "[s]ignificant discrepancies" between his first, *pro se* affidavit and his revised second affidavit, made with the help of counsel. (Pet. App. 62a.) However, the second affidavit did not contradict the first; rather, it simply contained additional information, and described some of the worst beatings with more specificity. (*Compare id.* at 85a-107a (counseled affidavit) *with id.* at 108a-123a (*pro se* affidavit).) This is unsurprising, considering

that Petitioner completed the second, more comprehensive affidavit with legal assistance.

The IJ also discounted otherwise undisputed evidence with generally nonsensical speculation, which even BIA noted was "unwarranted." (Pet. App. 28a.) For instance, the IJ found it "highly improbable" or "made no sense" that Afanwi attended church when he knew he might be in danger (*id.* at 63a), that he would evangelize while at risk of persecution, (*id.*), that he would be beaten and put to forced labor while in custody (*id.* at 65a-66a), that he could escape following his injuries (*id.* at 66a), or that his mother would suffer a beating rather than disclose her son's whereabouts to authorities (*id.* 66a-67a), none of which are remotely outside the human experience, let alone disputed by actual evidence in the record.

Finally, the IJ summarily dismissed, as "inconsistent," two medical reports by Dr. Peter Basch describing the loss of Petitioner's testicle. (Pet. App. 63a-64a.) The IJ's reasoning was that the first report said that there was "evidence of surgery on the scrotum and groin," while the second observed "evidence of trauma to the scrotum and groin," but that the doctor was supposedly not offered for cross-examination to "reconcile this inconsistency." (*Id.*) But Dr. Basch's second report does address the so-called "inconsistency"—namely, that "because of language difficulties" he misunderstood Afanwi's reference to "medical treatments" as meaning surgery, but that he corrected this misunderstanding after a follow-up examination and interview; it remained the case that his observations were at all time consistent with blunt force trauma to the groin.

(Pet. App. 124a-126a.) Moreover, the attorney for the Department of Homeland Security conceded that Dr. Basch was offered for cross-examination, but that DHS chose not to respond. (Pet. App. 139a-140a.)

Apart from these "inconsistencies," the IJ (1) improperly disregarded corroborating medical records from Cameroon; (2) did not address medical evidence that Afanwi had symptoms consistent with torture; (3) disregarded an undisputedly authentic police summons corroborating the persecution; (4) disregarded a newspaper article discussing Afanwi's persecution because it misspelled his name as the phonetically-identical "Afonui"; (5) disregarded affidavits of three professors with expertise on Cameroon that corroborated Afanwi's credibility; and (6) otherwise disregarded other testimony corroborating the details of Afanwi's affidavit. (*See* Pet. App. 54a-59a, 64a-65a, 67a.)

This record, taken as a whole, shows that the IJ's denial of relief was entirely unreasonable. Had Afanwi been able to seek review of that denial, the Fourth Circuit would have most likely vacated the IJ's flawed decision. The ineffective assistance of counsel that prevented such review was thus prejudicial.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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